LAW REFORM COMMISSION OF BRITISH COLUMBIA

AFFIDAVITS: ALTERNATIVES TO OATHS

(MINOR REPORT)

LRC 115

November, 1990

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE, Q.C., *Chairman*

HON. RONALD I. CHEFFINS, Q.C., *Vice-Chairman*

MARY V. NEWBURY

LYMAN R. ROBINSON, Q.C.

PETER T. BURNS, Q.C.

Thomas G. Anderson is Counsel to the Commission.

Gregory G. Blue is Legal Research Officer to the Commission.

Sharon St. Michael is Secretary to the Commission.

Linda Grant provides text processing and technical copy preparation.

The Commission offices are located at Suite 601, Chancery Place, 865 Hornby St., Vancouver, B.C. V6Z 2G3.

Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia.
Affidavits, alternatives to oaths

(LRC, ISSN 0843-6053 ; 115)

Cover title: Report on affidavits, alternatives to oaths.
ISBN 0-7718-8985-2

1. Affidavits - British Columbia. 2. Oaths - British Columbia. I. Title. II. Title: Report on affidavits, alternatives to oaths. III. Series: Law Reform Commission of British Columbia. LRC ; 115.

KEB184.02L38 1990 347.711'06 C91-092009-5

91-02349/

TO THE HONOURABLE RUSSELL G. FRASER
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

Dear Mr. Attorney:

Re: Affidavits: Alternatives to Oaths
(Minor Report, LRC 115)

The focus of this Report is to explore ways of reducing the inconvenience which frequently attends the formal swearing of an affidavit. It is recommended that in certain circumstances it should be possible to create a valid affidavit through a "solemn certification" without requiring an appearance before a Commissioner of Oaths. It is also recommended that the right to create an affidavit through a "solemn affirmation" be clarified.

Yours sincerely

Arthur L. Close

Arthur L. Close, Q.C.
Chairman

November 6, 1990

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A. Oaths Generally

Not all statements of fact may be taken at face value. A variety of circumstances exist in which it is appropriate to take some additional step to insure the honesty and accuracy of statements made. The most familiar way of insuring the veracity of a statement is to require that the statement be made under oath.

The oath may be seen as operating at two levels. First, it is normally attended by elements of solemnity and ceremony. This is thought to impress upon the person taking the oath that the occasion is one of importance involving a special duty to tell the truth. A statement made in a context of solemnity and ceremony is less likely to be made thoughtlessly or carelessly.

Second, where an oath truly binds the conscience of the person making the statement, the religious or moral implications of violating the oath makes it less likely that the person will tell an untruth. Even the individual who is unmoved by the religious or moral consequences of violating an oath will likely be deterred by the legal consequences it may attract. In most cases, giving false information under oath constitutes an offence under the *Criminal Code*.[1] Depending on the circumstances, it may constitute perjury which can lead to imprisonment for up to 14 years.[2]

The occasions on which a statement is made under oath may be roughly divided into two categories. The first category consists of those occasions in which statements are made in the course of judicial proceedings. In the second are a multitude of occasions in which specific enactments of the province require that certain acts be accompanied by an oath such as the provision of information, under oath, to agencies of government.[3]

B. Previous Commission Work

The second category of occasions was the subject of a study by this Commission carried out over 15 years ago. In 1974 the

1. R.S.C. 1985, c. C-46.
2. *Ibid.*, ss. 131, 132.
3. They may also include an "oath of office" given as part of assuming a particular occupation or position.

Attorney General for British Columbia requested that the Commission:[4]

> (a) examine the extent to which the statutes of British Columbia require, or provide for the use of affidavits and statutory declarations in non-court matters; and
>
> (b) explore the rationale behind those uses and consider the desirability of eliminating the need for them or developing less complex alternative devices designed to achieve the same end.

The Commission's Report, issued in 1976, identified over 400 statutory provisions covering a wide range of governmental and non-governmental activities in which "a formality of verification"[5] was imposed. It was concluded that in a large number of these instances, verification of the information, on oath, was unnecessary and inconvenient. A simple provision making it an offence to supply false information would serve equally well. The Commission recommended that almost 100 statutes be amended to implement this approach.

The recommendations made in that Report have not, so far as they call for the amendment of existing legislation, been fully implemented. We believe that they retain their force as matters which call for action and suggest that their implementation be considered in conjunction with the next revision of the British Columbia statutes which we understand is not far off.

The other category of circumstances which call for the formalities of verification are matters relating to a proceeding in court where the statement to be verified is evidence touching on the subject matter of the proceeding or on the conduct of the proceeding itself. These occasions were expressly excluded from the 1976 Report:[6]

> A further limitation on our terms of reference in this Report should be noted at once. We were asked only to review the ways in which law insures the honesty and accuracy of statements made outside court proceedings, and we do not here examine the matter of oaths and affidavits in the judicial process.

In this Report, we return to the topic of formalities of verification, but this time our focus is on the use of sworn statements as part of the court process.

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4. Law Reform Commission of British Columbia, *Report on Extra-Judicial Use of Sworn Statements* (LRC 27, 1976) 5.
5. This was an expression adopted in the 1976 Report to designate the use of an oath to reinforce the truth and accuracy of information.
6. *Supra*, n. 4.

CHAPTER II

OATHS AND AFFIDAVITS IN THE COURT PROCESS

A. Affidavits

Although the popular view, shaped by the media, tends to regard evidence as synonymous with oral testimony given in court, a large volume, perhaps the greater part, of court business is based on written statements of fact. Most frequently, these statements of fact are contained in a sworn document known as an affidavit.[1]

Typically, an affidavit conforms to a highly structured format. The proceeding in which it is to be offered as evidence is identified at the head of the document, usually through a recital of the court, action number and the identity of the parties. The person making the statement (referred to as the "affiant") is then identified by name, occupation and residence. Following that, the statements of fact to be offered as evidence are set out in numbered paragraphs. The affiant must also state whether he has personal knowledge of the facts set out or is merely stating them on "information and belief" and, in that case, the source of the information.[2] At the foot of the affidavit and to the right is a place for the signature of the affiant.

For the affidavit to be properly completed, the affiant must appear in person before a person authorized by law for that purpose and "swear" the affidavit. In this province such a person is known as "a Commissioner for taking affidavits for British Columbia."[3] Before the affidavit can be sworn, the Commissioner must be satisfied of the identity of the affiant and that the affiant understands its contents. The swearing of an affidavit

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1. Throughout this Report we use the term "affidavit" in a generic sense to refer to a written statement of fact, the truth of which has been verified in accordance with a solemn procedure conducted by a second person. Such a writing may be known by any one of a number of names depending on the circumstances in, and purpose for, which it was made and the character of the procedure. Similarly, the words "oath" and "swear" or "sworn" are intended to encompass a range of solemn procedures which may not involve an oath in the technical sense. This usage is consistent with the *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29:

> "affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm;

A more detailed discussion may be found in Appendix B.

2. For the purposes of some matters the affiant need not have personal knowledge of the facts set out. In that case the affidavit may state that the affiant has "been informed" of the facts by a named person and that the affiant believes the facts to be true. The *Evidence Act*, R.S.B.C. 1979, c. 116, s. 61, provides that "A person may make a statement of fact, opinion, belief or knowledge by means of an affidavit."

3. *See Evidence Act*, *ibid.*, ss. 63-69.

occurs when ritualistic words concerning the truth of the affidavit are put to the affiant by the Commissioner, and the affiant responds in a way which indicates that the contents of the affidavit are true.[4]

All that remains to "perfect" the affidavit is for the Commissioner to complete the "jurat" which is a short notation to the left of the affiant's signature identifying the date and place the affidavit was sworn and the identity of the Commissioner. The jurat is signed by the Commissioner.

B. Commissioners for Taking Affidavits

The *Evidence Act*[5] contains a number of provisions relevant to Commissioners. The powers of a Commissioner are described in section 66:

> **66.** Subject to restrictions, exceptions, terms or conditions set forth in an order under section 63, and to section 68, a commissioner for taking affidavits for British Columbia may, in or out of the Province, administer oaths and take affidavits, declarations and affirmations concerning
>
> (a) any cause, proceeding, matter or thing before the Supreme Court or any other court in the Province;
>
> (b) any matter in connection with which an oath, affidavit, affirmation, solemn declaration or statutory declaration is permitted, authorized or required by law to be sworn, affirmed, declared or made.

The designation of Commissioners is regulated by sections 63 and 67. Section 63 sets out a general power in the Attorney General to appoint Commissioners:

> **63.**(1) The Attorney General may appoint, by order, commissioners for taking affidavits for British Columbia.
>
> (2) An appointment under subsection (1) may be made for a period and subject to restrictions, exceptions, terms and conditions that the Attorney General sets forth in the order.

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4. The Commissioner might ask:
   Do you swear that the contents of this affidavit are true, so help you God?
   or
   Do you make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath?
   and the affiant might respond "yes" or "I do."
   See Bencher's Bulletin, 1985, No. 2.
5. *Supra*, n. 2.

Section 67 sets out a list of persons who are, *ex officio*, Commissioners:[6]

> **67.** The following are, by virtue of their office or employment, commissioners for taking affidavits for British Columbia:
>
> (a) every judge of a court in the Province;
>
> (b) justices in the Province;
>
> (c) registrars, deputy registrars, district registrars and deputy district registrars of the Supreme Court or County Courts;
>
> (d) barristers and solicitors enrolled under the *Legal Profession Act* and not disbarred, disqualified or suspended from practice;
>
> (e) notaries public;
>
> (f) the clerk and deputy clerk of each municipality in the Province;
>
> (g) the secretary of a regional district;
>
> (g.1) the secretary treasurer of a board of school trustees;
>
> (h) coroners;
>
> (i) government agents and deputy government agents;
>
> (j) provincial constables and municipal constables as defined in the *Police Act* holding a rank of sergeant or higher;
>
> (k) other classes of office holder or employment the Attorney General prescribes.

The appointment of Commissioners by the Attorney General under section 63 of the *Evidence Act* was discussed in a recent Report of a Committee of the British Columbia Branch of the Canadian Bar Association:[7]

> Individuals applying for appointments must complete an application form provided by Court Services. If the individual falls within the guidelines confirmed by the Attorney General, an Order may be granted by the Attorney General appointing the individual as a Commissioner for taking affidavits subject to any restrictions as to length of appointment and authority under the Evidence Act as may be directed.

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6. The *Evidence Act* also makes other provision for the taking of affidavits. Under section 71 commissioned officers of the Canadian Armed Forces on active service are also authorized to take affidavits although they are not expressly designated as Commissioners. Under s. 68, social workers are designated as Commissioners but they are authorized to take affidavits only in connection with the performance of their powers and duties. S. 70 provides for the taking of affidavits outside the province.

7. Legislation regarding Commissioners for Swearing Oaths, Peter Sommerville, Chairman (June 1989).

All appointments are limited in time to three year terms. Thereafter, applicants are required to reapply for an appointment.

A fee of $30.00 is required and must accompany the application unless the applicant is a Provincial Government employee or a Federal Government employee or an officer or employee of a Veterans Organization.

According to the "Guidelines for Appointment of Commissioner's for taking affidavits", the Attorney General will order that a person be appointed a Commissioner only where there is a demonstrated public need for the appointment. Appointments will not be made that would solely benefit a single person or single business establishment or that apparently are of a self-serving nature. Persons employed in the office of a lawyer in private practice or notary public are not be appointed.

The Canadian Bar Association Report recommended a relaxation of those guidelines. In particular, it was suggested that they should permit the appointment of a legal secretary or articled student in the office of a sole legal practitioner. That recommendation was a response to the following concern:[8]

> There would appear to be a demonstrated public need for the appointment of a legal secretary or articled student in a sole practitioner's office as a Commissioner for taking affidavits for British Columbia. It would assist the public at no cost and reduce the delay and inconvenience where a sole practitioner must attend before another Commissioner within the same community, which can increase the cost and create delay, especially if it is particularly late in the day, evenings or on holidays.

This Report, no doubt, identifies a legitimate concern. It is not wholly clear to us, however, that the best way of meeting it is through a further proliferation of Commissioners for taking affidavits. We think it may be worth exploring, as the Commission did in the 1976 Report, whether this concern, and others, can be met through eliminating the need, in appropriate circumstances, to appear before a Commissioner to swear.

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8. *Ibid.*

A. American Innovations

In some American jurisdictions, the need to appear before a Commissioner, or equivalent officer, seems to have virtually disappeared. A jurisdiction which has gone very far in this direction is California. Section 2015.5 of the *Code of Civil Procedure* provides:[1]

> **2015.5 Certification or declaration under penalty of perjury**
>
> Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California. The certification or declaration may be in substantially the following form:
>
> (a) If executed within this state:
>
> "I certify (or declare) under penalty of perjury that the foregoing is true and correct":
>
> _____ _____
>
> (Date and Place) (Signature)
>
> (b) If executed at any place, within or without this state:
>
> "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct":
>
> _____ _____
>
> (Date and Place) (Signature)

The formalities imposed by this provision are minimal. All that is required to convert a written statement of fact having limited legal status into a document having the force and effect of an affi-

1. West's *Ann. Cal. C.C.P.*, s. 2015.5.

davit is a simple certification or declaration "under penalty of perjury" that the statement is correct. For convenience, we refer to a document created in this way as a "certified affidavit."

The California provision invites comparison with its New York counterpart. Article 2106 of the New York *Civil Practice Law and Rules* provides:

> The statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

It is evident that the New York formulation of the provision is narrower in two ways. First, the New York rule appears to apply only to statements made in the context of civil litigation.[2] The California rule is triggered by a verification requirement arising "under any law of this state." Second, the New York rule applies only to statements made by a short list of designated professional persons. The California rule permits any person to make a certified affidavit.

B. British Columbia Developments

The American approach has a certain parallel in British Columbia with respect to expert evidence. Section 10(2) of the *Evidence Act* provides:

> 10. (2) A statement in writing setting out the opinion of an expert is admissible in evidence in a proceeding without proof of the expert's signature if a copy of the written statement is furnished to every party to the proceeding who is adverse in interest to the party tendering the statement at least 30 days before the statement is given in evidence

The *Evidence Act* contains no requirement that the expert's opinion be sworn. It is likely that many of the statements made by the heath professionals identified in the New York provision are expert opinions of the kind rendered admissible by the British Columbia legislation.

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2. The New York rule is further narrowed by a requirement that only a person who is not a party to the action can make a certified affidavit.

So far as we are aware, the experience in this province with admitting unsworn statements of expert opinion has been positive. This suggests that there may be a place in British Columbia law for a certified affidavit along the lines permitted by the California and New York legislation. In the following chapter we consider what the scope and characteristics of such an innovation might be.

A. In What Circumstances Should the Certified Affidavit be Available?

What scope should be permitted in the use of the certified affidavit? Should the New York model be followed, under which the certified affidavit is confined, essentially, to civil litigation and the circumstances where the conventional affidavit is now normally used? Or should the California model be adopted and the use of the certified affidavit be permitted wherever provincial law calls for a sworn statement in writing?

Our preference is to confine the availability of the certified affidavit to civil litigation. There are two reasons which underlie this preference. First, to propose that the certified affidavit should be available outside the court setting is, in substance, to restate the recommendations made in our 1976 Report, but in a less satisfactory form. We are still optimistic that those recommendations will be implemented. When that occurs the number of provisions which call for the verification of information by a sworn statement, in a non-court setting, will be greatly reduced. This, we believe, is the correct approach to lessening the inconvenience created by these provisions.

Second, confining the certified affidavit to actions conducted within the framework of the Rules of Court arguably eliminates the need to develop a separate set of sanctions against falsehoods in certified affidavits. More will be said about this later.

B. Who Should be Entitled to Make a Certified Affidavit?

The California legislation permits any person to make a certified affidavit. Is this too comprehensive? There may be significant numbers of individuals who might sign these documents without fully appreciating both that the occasion carries with it a special obligation to tell the truth and a failure to do so may result in legal sanctions and penalties. Appropriate language to "trigger" the legal effect of the document, and heighten the appreciation of the legal significance of the affidavit, is neither a complete nor satisfactory answer. The interposition of a Commissioner for taking affidavits may still serve a useful purpose

for large numbers of affiants and a degree of caution seems desirable.

If a view is adopted that the certified affidavit should not be available to all potential affiants, it becomes necessary to define who should be qualified to make a certified affidavit. The characteristics of such persons would appear to be a general familiarity with the process of making a conventional affidavit. This would carry with it the knowledge that the making of an affidavit is an occasion which raises a special duty to tell the truth and which carries legal sanctions for telling a non-truth. The persons who best satisfy this criteria are those who are, themselves, qualified to administer oaths and take the affidavits of others.

This analysis suggests that the capacity to make a certified affidavit might be given to those persons who are, by virtue of their office, Commissioners for taking affidavits for British Columbia – the persons set out in section 67 of the *Evidence Act*. That list includes members of the legal profession, so the concerns raised in the Canadian Bar Association Report respecting the difficult position of the sole practitioner would be met by the proposal. But tying capacity to an existing statutory list in this way would avoid the suggestion inherent in the New York formulation that the members of certain professions have a greater appreciation of the need to tell the truth than the members of others.

C. Sanctions

To swear, knowingly, a false affidavit is a criminal offence which can attract severe punishment. The laws which regulate this aspect of affidavits are found in the *Criminal Code*[1] of Canada rather than a provincial statute. Making a false affidavit constitutes an offence known as perjury as described in section 131 of the *Code*:

> **131.** (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.
>
> (2) Subsection (1) applies whether or not a statement referred to in that subsection is made in a judicial proceeding.

1. R.S.C. 1985, c. C-46.

(3) Subsection (1) does not apply to a statement referred to in that subsection that is made by a person who is not specially permitted, authorized or required by law to make that statement.

The punishment for perjury is set out in section 132 of the *Code*:

132. Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, but if a person commits perjury to procure the conviction of another person for an offence punishable by death, the person who commits perjury is liable to a maximum term of imprisonment for life.

The *Code* also sets out a further offence in relation to false affidavits:

134. (1) Subject to subsection (2), every one who, not being specially permitted, authorized or required by law to make a statement under oath or solemn affirmation, makes such a statement, by affidavit, solemn declaration or deposition or orally before a person who is authorized by law to permit it to be made before him, knowing that the statement is false, is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to a statement referred to in that subsection that is made in the course of a criminal investigation.

The relationship of this provision to section 131 is somewhat obscure. Finally, the *Code* sets out certain offences relating to affidavits. Section 138 provides:

138. Every one who

(a) signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the writing was not so sworn or declared or when he knows that he has no authority to administer the oath or declaration,

(b) uses or offers for use any writing purporting to be an affidavit or statutory declaration that he knows was not sworn or declared, as the case may be, by the affiant or declarant or before a person authorized in that behalf, or

(c) signs as affiant or declarant a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared by him, as the case may be, when the writing was not so sworn or declared,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

The offence created by section 138 is directed at fraudulent conduct in the creation or use of a purported affidavit rather than

the making of false statements in an affidavit whose creation otherwise complies with the law.

Would the making of a certified affidavit of the kind provided for in the California or New York legislation, which contained a deliberate falsehood, render the affiant liable under the *Code* provisions set out above? It is suggested they would not. An essential element of both the offence of perjury and the offence created by section 134 is that the accused has made the false statement "before a person who is authorized by law to permit it to be made before him." The essence of the certified affidavit is that an appearance before such a person is unnecessary. Words in the document indicated that it has been executed or made "under penalty of perjury" does not alter this conclusion. That formulation is effective in the American jurisdictions only because the crime of perjury is defined in a way which gives force to this practice.[2]

If British Columbia were to permit the use of the certified affidavit, what, if any, sanctions would attend the making of a false statement? Although the provisions of the *Criminal Code* that expressly concern affidavits may not apply, there are two more general offences which may be relevant. Section 137 of the *Code* creates the offence of fabricating evidence:

> **137.** Every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

That provision, on its face, could well encompass the making of a certified affidavit for use in a judicial proceeding. The more general offence of obstructing justice may also be relevant. Section 139(2) of the *Code* provides:

> **139.** (2) Every one who wilfully attempts ... to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

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2. For example, section 118 of the *California Penal Code* provides:
   118. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law of the State of California be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, and every person who testifies, declares, deposes, or *certifies under penalty of perjury* in any of the cases in which such testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and wilfully states as true any material matter which he knows to be false, is guilty of perjury. [Emphasis added.]

It has been held that the words "attempts in any manner" include perjury as a means of committing the offence.[3]

While it might be desirable that there be a provision of the *Criminal Code* which targets more directly the certified affidavit, the two provisions of the *Criminal Code* set out above go some distance toward ensuring the integrity of such documents.[4] We have considered whether they should be reinforced by any general penal measure enacted under provincial law, but have concluded that that would be a perilous course in terms of constitutional law. So long as the use of the certified affidavit is confined to judicial proceedings it is probably an unnecessary course.[5]

D. What Words Should Trigger the Legal Consequence?

One advantage to the formalities which surround the making of a conventional affidavit is that the resulting document is readily identifiable as such. The format of the document, the jurat, and the signature of the Commissioner all contribute to the impression that the document is something more than a mere piece of paper that is not intended to have any legal force or consequence. The key element, however, is the signature of the Commissioner which verifies that the affidavit was properly sworn. It is this, in the final analysis, that distinguishes an affidavit from a writing which has all of the outward appearance of an affidavit, but is not.

Permitting an affidavit to be made, unsworn, will remove that key element and it is necessary to find something to replace it. In California and New York this function is carried out by the addition of a phrase containing the words "under penalty of perjury." A signed document which does not contain those words has no effect as an affidavit.[6]

In a British Columbia context, this function could be served by a requirement that to have effect as a certified affidavit the document must, immediately above the signature of the affiant,

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3. *R.* v. *Simon*, (1979) 45 C.C.C. (2d) 510 (Ont. C A.); *R.* v. *Moore*, [1980] 4 W.W.R. 511 (B.C.C.A).
4. Frequently the "certified affiant" will be a lawyer and knowingly putting forward a document containing untrue information would be grounds for professional discipline of the severest kind. This is a most effective deterrent.
5. If the certified affidavit were more generally available, it would probably be necessary to create a distinct provincial offence in relation to the various statutory requirements to provide information verified by an affidavit.
6. Also, as noted above, those words trigger a sanction for perjury if the information is false.

state that it is made pursuant to the enabling legislation (likely a section of the *Evidence Act*) with the intent that it constitute an affidavit in a judicial proceeding.

E. The Solemn Affirmation

It remains to consider a minor technical point which has arisen in the course of this study. We have relegated to Appendix B a discussion of a group of provisions of the provincial *Evidence Act* and the *Canada Evidence Act*[7] which touch on alternatives to oaths and their application to written statements of fact. This discussion concludes that there is some doubt as to the right to create a valid affidavit by a solemn affirmation as to the truth of its contents.

This does not create a serious gap since the affiant who objects to verifying the statements under oath can always create a solemn declaration under section 77 of the *Evidence Act*.[8] The problem we see is that an affirmation may be inadvertently administered, resulting in an affidavit whose (possible) invalidity only emerges at a later and highly inconvenient time. A simple amendment to the *Affirmation Regulation*[9] would clearly validate such a procedure.

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7. R.S.C. 1985, c. C-5.
8. *See* Appendix B.
9. B.C. Reg. 396/89; O.C. 1805/89, Deposited Dec. 18, 1989.

CHAPTER V CONCLUSION AND RECOMMENDATIONS

A. Conclusion

It is our conclusion that British Columbia law should provide for a certified affidavit, subject to the limitations and qualifications set out in the previous Chapter. We believe that these are desirable, at least initially, to ensure its integrity. Once there is some experience with the certified affidavit, it may be possible and desirable, in the light of that experience to refine these limitations and expand its use. The right to create an affidavit by affirmation should also be clarified.

B. Recommendations

The Commission's recommendations are as follows:

1. *The* Evidence Act *be amended to provide that where the contents of an affidavit are solemnly certified to be true, the affidavit is validly made and is receivable as evidence of the facts set out in any civil proceeding, for any purpose and in any circumstance that a sworn affidavit would be receivable.*

2. *An affidavit is solemnly certified only if, at its foot and immediately above the maker's signature, it contains the words:*

> *"Pursuant to section [ ] of the* Evidence Act, *I solemnly certify the contents of this document to be true, with the intent that it have the force and effect of an affidavit."*

3. *An affidavit may be solemnly certified to be true by the maker without any appearance before a Commissioner for taking affidavits.*

4. *Only those persons who are Commissioners for taking affidavits for British Columbia by virtue of their office or employment, pursuant to section 67 of the* Evidence Act, *should have the capacity to make an affidavit by solemn certification.*

5. *An affidavit made by a solemn certification should differ from a sworn affidavit only in the following respects:*

(i) *the word CERTIFY, or a grammatical variation of it, be used where OATH normally appears,*

(ii) *the capacity of the maker to make an affidavit by a solemn certification is expressly set out in it,*

(iii) *in place of the jurat and to the left of the maker's signature, the following words appear:*

> *"Certified at the [city, town etc.] of [name] in the Province of British Columbia this [date] day of [month and year]."*

6. *Each exhibit to an affidavit made by solemn certification should be appropriately endorsed and signed by the maker.*

7. *Section 1 of the* Affirmation Regulation *be amended to clarify that it applies only to affirmations made in relation to the giving of oral evidence or testimony.*

8. *A new section be added to the* Affirmation Regulation *as follows:*

> 2. *The prescribed form of solemn affirmation, for the purposes of section 21 of the* Evidence Act, *to be used in the making of an affidavit is a positive response by the affiant to a query which is substantially as follows:*
>
> > *"Do you solemnly promise, affirm and declare that the contents of this affidavit are true?"*

An example of an affidavit made through a solemn certification as described in these recommendations is set out as Appendix A to this Report.

APPENDIX A

AN EXAMPLE OF A CERTIFIED AFFIDAVIT

No. C98765/91

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DUDLEY DOE MORTGAGE CO.

PLAINTIFF

AND:

ROGER RILEY ROE

DEFENDANT

AFFIDAVIT

I, PETER PAUL POE, Barrister and Solicitor, of 12345 West 67th Avenue, in the City of Vancouver, in the Province of British Columbia, **CERTIFY AND SAY AS FOLLOWS**:

1. I am the solicitor for the Plaintiff in this proceeding and as such I have personal knowledge of the matters and facts set out in this affidavit except those stated to be based on information and belief and, as to those matters and facts, I believe them to be true.

2. Owing to my office as barrister and solicitor, and the effect of sections 67 and [ ] of the *Evidence Act*, I have the capacity to make this affidavit by solemnly certifying its contents to be true.

3. Now produced and shown to me and marked Exhibit "A" to this affidavit is a copy of an offer to purchase the land and premises which are the subject matter of this proceeding, dated February 28, 1991, made by BowWow Developments Ltd., for a purchase price of $225,000.00.

4. I am informed by Joan Jones of Quiklook Appraisals Inc., and believe it to be true, that she is of the opinion that the current market value of the land and premises is $230,000.00. Now produced and shown to me and marked Exhibit "B" to this affidavit is a copy of Joan Jones written appraisal.

5. I am informed by Norman Norton, a salesman with Listnow Realty Ltd., and believe it to be true, that the real estate market for property similar in kind and location to the land and premises is declining and an offer to purchase better than that set out in Exhibit "A" is not likely to be received in the near future.

PURSUANT to section [ ] of the *Evidence Act*, I SOLEMNLY CERTIFY the contents of this document to be true, with the intent that it have the force and effect of an affidavit.

Certified at the City of Vancouver,)
in the Province of British Columbia) *"Peter Paul Poe"*
this 15th day of March, 1991) Peter Paul Poe

Endorsement on Exhibit

This is the Exhibit [ ]
referred to in the affidavit
of Peter Paul Poe, certified
the 15th day of March, 1991.

"Peter Paul Poe"
Peter Paul Poe

APPENDIX B

A NOTE ON SWORN STATEMENTS

A. Introduction

A kaleidoscopic array of legislation, enacted both provincially and federally, touches on the making of affidavits. In canvassing the relevant enactments, a starting point is to note that nowhere does legislation purport to describe or mandate the formalities which must surround the creation of an ordinary affidavit in which the affiant verifies the truth of its contents under oath, or the form of words to be used. One must look to the general law for this.[1] It is generally accepted that a positive response to the formulation:

> Do you swear the contents of this affidavit are true, so help you God?

is sufficient to create a valid affidavit under oath.[2]

The various enactments applicable to the making of sworn statements tend to focus on creating forms of verification which provide an alternative to the oath, but have an equivalent legal effect. These alternative forms of verification are of two kinds: the solemn affirmation and the solemn declaration.[3]

B. Solemn Affirmation

A solemn affirmation is expressly provided for in the *Canada Evidence Act*.[4] Section 15 provides:

> **15.** (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit that person, instead of being sworn, to make his solemn affirmation in the words following, namely, "I do solemnly affirm, etc.", and that solemn affirmation shall be of the same force and effect as if that person had taken an oath in the usual form.
>
> (2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.

---

1. *See generally*, *Benchers Bulletin*, 1985, No 2.
2. Our legal system also has experience with oaths designed to bind the consciences of persons who hold a wide variety of religious beliefs and for whom the "usual" form of oath would be inappropriate. Such oaths tend to be administered, however, almost exclusively in circumstances where the person receiving the oath is being "sworn in" prior to giving oral evidence in a court. The authorities offer little assistance on the ways in which these forms of oaths might be adapted to the process of affidavit making.
3. The recommendation contained in the body of this Report would add the "solemn certification" to this list.
4. R.S.C. 1985, c. C-5. The application of the general Part of the Act is set out in section 2:
   > **2.** This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

APPENDIX B

The status of the solemn affirmation under provincial law is somewhat ambiguous. A starting point is section 21 of the *Evidence Act* which provides for affirmations generally:[5]

> **21.** (1) For all purposes for which an oath is required by law, a person may, instead of taking an oath, make a solemn affirmation in the prescribed form.
>
> (2) Where, in the opinion of the presiding officer, it is not reasonably practicable without inconvenience or delay to administer an oath to a person in the form or manner appropriate to the person's religious beliefs, the person shall, notwithstanding any other enactment or law, make a solemn affirmation in the prescribed form.
>
> (3) In subsection (2) "presiding officer" includes,
>
> (a) in a proceeding in which evidence is taken, the judge, and
>
> (b) in any other case, a person having by law the authority to administer an oath.
>
> (4) A solemn affirmation in the prescribed form has the same force and effect as an oath.
>
> (5) The Lieutenant Governor in Council may prescribe the form of a solemn affirmation and may prescribe different forms for different purposes.

On its face, this provision would appear to authorize the creation of an affidavit through a solemn affirmation since the making of an affidavit is a "purpose for which an oath is required by law." The section also requires, however, that the affirmation be in the prescribed form. The *Affirmation Regulation* made under the *Evidence Act* provides:[6]

> **1.** The prescribed form of solemn affirmation for the purposes of section 21 of the *Evidence Act* is as follows:
>
> "I solemnly promise, affirm and declare that the evidence given by me to the court [or as the case may be] shall be the truth, the whole truth and nothing but the truth."

The language of the regulation suggests, at least inferentially, that it was only intended that affirmation be employed where evidence was being given orally to a court or other tribunal.

But curiosities abound as to the use of affirmation in other sections of the *Evidence Act*. In particular, a common formulation is a reference to "affidavits, declarations, and affirmations."[7] This usage suggests the recognition of some kind of document known as an affirmation and which is something different from an affidavit. The usage of "affirmation" in the *Evidence Act* seems to vacillate between a word used to designate a process by which the truth of statements contained in a document are verified, and the document itself.

What would be the status of a document, made before a Commissioner but, rather than being sworn, was affirmed through some adaptation of the

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5. R.S.B.C. 1979, c. 116, s. 21.
6. B.C. Reg. 396/89; O.C. 1805/89, Deposited Dec. 18, 1989.
7. *See* ss. 74, 76, and 71.

language of the affirmation regulation?[8] This question invokes a consideration of two further provisions. First, section 74 of the *Evidence Act* authorizes the reception of verified documents notwithstanding irregularities in form. Even if it was held impermissible to create an affidavit through a solemn affirmation, an attempt to do so might still be regarded as an irregularity which was curable under section 74.

The final enactment which may be relevant is a definition set out in section 29 of the *Interpretation Act*:[9]

> "affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm.

It might be argued that this definition would provide a legal basis for the creation of an affidavit by affirmation, even if on a highly technical reading, section 21 of the *Evidence Act* and the *Affirmation Regulation* were insufficient to do so. The defect in this argument is that the *Interpretation Act* only allows the substitution of "affirm" for "oath" where the latter occurs in a statute. The requirement for an oath in the creation of an affidavit is imposed by the general law and not a statute. There is nothing on which the extended definition can operate.

It is difficult to state any conclusion with certainty on this issue. A close reading of the relevant legislation does, however, suggest that the right, under provincial law, to affirm an affidavit is uncertain at best and non-existent at worst. This leaves the province in an anomalous position since the right clearly exists under federal law. Moreover, in England the use of affirmation in the creation of affidavits has been recognized for over a century.[10]

C. Solemn Declaration

The other kind of formality provided for in legislation is the solemn declaration. Section 41 of the *Canada Evidence Act* provides:[11]

> 41. Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:
>
> I, ..., solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.
>
> Declared before me..... at ..... this .....day of ..... 19.....

---

8. The affirmation might occur in one of two ways. First, the words of affirmation might be uttered by the affiant as required by s. 15 of the *Canada Evidence Act*. Second, the affiant might respond positively to a query framed in terms of affirmation rather than oath (Do you solemnly affirm... etc? I do.).
9. R.S.B.C. 1979, c. 206.
10. *See Oaths Act, 1888*, 51 & 52 Vict., c. 46., s. 4.
11. *Supra*, n. 4.

This provision is paralleled by section 77 of the provincial *Evidence Act*[12] which provides:

> **77.** A gold commissioner, mayor or commissioner authorized to take affidavits, or any other person authorised by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making it before him in attestation of the execution of any writing, deed or instrument, or of the truth or any fact, or of any account rendered in writing, in the following words:
>
> > I, A.B., solemnly declare that [*state the facts declared to*], and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath.

12. *Supra*, n. 5.